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FEDERAL COMMUNICATIONS COMMISSION  
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*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

**In the Matter of**

)

**CC Docket No. 96-45**

)

**Federal-State Joint Board on**

)

**Universal Service**

)

**JOINT COMMENTS OF**  
**PEOPLE FOR THE AMERICAN WAY, MEDIA ACCESS PROJECT,**  
**ALLIANCE FOR COMMUNICATIONS DEMOCRACY, ALLIANCE FOR**  
**COMMUNITY MEDIA, BENTON FOUNDATION, CENTER FOR MEDIA**  
**EDUCATION, LEAGUE OF UNITED LATIN AMERICAN SYSTEMS,**  
**MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, NATIONAL**  
**ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,**  
**NATIONAL COUNCIL OF LA RAZA, NATIONAL URBAN LEAGUE, and**  
**RAINBOW-PUSH COALITION**

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## SUMMARY

In passing the universal service provisions of the Telecommunications Act of 1996, Congress intended that *all* Americans have access to advanced telecommunications technologies. The plain language of the Act could not be more unambiguous - the Joint Board is to base its universal service policies on the principle that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation.” 47 U.S.C. § 254(b)(2). Congress understood that these services will provide the backbone for citizen participation in the democratic process, the economic marketplace, and social and cultural activities in the information age.

Despite this clear directive, the Joint Board has chosen not to include advanced services in its definition of universal service. This constricted definition is not only contrary to the plain language of the Act, it disenfranchises the very people that universal service is supposed to help - low income and rural Americans, most of whom are already behind in the transition to an information society.

The Joint Board’s decision to exclude Internet access from the definition of a “telecommunications service” is equally pinched, and misunderstands the nature of basic Internet service. Like other telecommunications services, Internet service providers provide “conduit,” and not “content.” The Joint Board recognizes this by providing schools and libraries for the conduit of Internet services, but not the content.

The Joint Board’s decision to review the definition of universal service by January 1, 2001 also defies the plain language of the Act. Section 254(c)(1) mandates that the Commission review that definition “*periodically*,” not one time after four years. Given the lightning speed

with which technology changes, a biennial review, at least, is needed to ensure that universal service policies reflect reality.

The Joint Board's definition of "affordability" better reflects Congress' intent, as it takes into account non-rate factors and income levels, and gives the states a leadership role in shaping that definition. The Commission should take the Joint Board's recommendation one step further, however, and establish a fixed or progressively increasing percentage of disposable income upon which "affordability" must be based.

Finally, Commenters applaud the Joint Board's interpretation of Section 254(h) to provide a 20-90% discount on all telecommunications services, Internet access and internal connections. To better promote universal and non-discriminatory access to advanced telecommunications services, however, the Commission must do more. First, it should provide for similar support to other community institutions and organizations. Second, it should protect against discriminatory deployment of these services by requiring certification from fund administrators that the deployment of advanced services in schools will occur in a manner that does not discriminate on the basis of race. In school districts that are, or were, subject to federal court supervision, that certification should be supplemented by information adequate to ensure compliance with Title VI of the Civil Rights Act's goal of affirmatively eliminating the consequences of school segregation.

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COMMUNICATIONS DEMOCRACY, ALLIANCE FOR COMMUNITY MEDIA,  
BENTON FOUNDATION, CENTER FOR MEDIA EDUCATION, LEAGUE OF UNITED  
LATIN AMERICAN CITIZENS, MINORITY MEDIA AND TELECOMMUNICATIONS  
COUNCIL, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED  
PEOPLE, NATIONAL COUNCIL OF LA RAZA, NATIONAL URBAN LEAGUE, and  
RAINBOW-PUSH COALITION**

People for the American Way, Media Access Project, Alliance for Communications  
Democracy, Alliance for Community Media, Benton Foundation, Center for Media Education,  
League of United Latin American Citizens, Minority Media and Telecommunications Council,  
National Association for the Advancement of Colored People, National Council of La Raza,  
National Urban League, and Rainbow-PUSH Coalition ("Commenters") respectfully submit  
these comments in response to the Commission's *Public Notice: Common Carrier Seeks  
Comment on Universal Service Recommended Decision*, DA 96-1891, (released Nov. 18, 1996)  
("Public Notice"). These comments address several of the recommendations contained in the  
Federal-State Joint Board's *Recommended Decision*, FCC No. 96J-3, CC Docket No. 96-45  
(released Nov. 8, 1996).

**INTRODUCTION**

The emerging telecommunications infrastructure promises to fulfill the core goals of the  
First Amendment by facilitating greater levels of public discourse and participation in the

democratic process, but only if *all* Americans can take advantage of advanced telecommunications and information services. These services are also increasingly essential for education, emergency services, and commerce. When certain segments of our society are shut out from these vital resources because they lack affordable access, they are not the only ones who are deprived. Universal service policies must reflect the fact that increased access will benefit society as a whole, by producing a better informed, educated, and healthier citizenry that is better able to compete in the global economy.

The plain language of the Telecommunications Act of 1996 (“Act”) manifests this vision by requiring that the Joint Board base its universal service policies on the principle that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation.” 47 U.S.C. § 254(b)(2). Thus, Congress directed the Joint Board and the Commission to establish a system in which everyone would have access to the range of telecommunications services necessary to ensure full participation in society.

Despite this expansive vision, the Joint Board has chosen to define narrowly the basket of services that the universal service provisions would support. The Commenters urge the Commission to augment the Joint Board’s definition to include more advanced services, which are increasingly becoming necessities, rather than luxuries. In particular, the Commenters urge the Commission to reject the Joint Board’s recommendations on Internet service, which not only would presently deny support for such access, but would also likely preclude its consideration in the near future. The Joint Board should also initiate a review of the universal service policies every two years, to ensure that they reflect the telecommunications needs of every citizen in light of rapid technological advances.

The Commenters generally agree with the Joint Board's recommendations on how to define "affordability." As the Joint Board recognized, non-rate factors such as the local calling area play a role in determining whether a rate is actually affordable, and the states are in the best position to evaluate these factors. Furthermore, the Commenters applaud the Joint Board's conclusion that high subscribership levels do not necessarily indicate affordable rates. The Commission should go a step further, by basing its definition on a fixed or progressively increasing percentage of disposable income.

Finally, the Commenters welcome the Joint Board's recommendations for school and library access to advanced services at discounted rates. By recommending discounts for all telecommunications services, Internet access, and internal connections, the Joint Board has taken aggressive steps to connect America's schools and libraries to the information age. The Commenters urge the Commission to apply the same principles in defining the individual services that will be supported, as well as extending support for services used by other community institutions, such as community computer and media centers. In addition, the Commission must adopt protections to ensure that advanced services are not deployed in a manner that discriminates based on race.

**I. THE JOINT BOARD FAILED TO RECOMMENDED A SUFFICIENTLY BROAD DEFINITION OF UNIVERSAL SERVICE**

**A. The Commission Should Provide Support for More Advanced Services**

In its recommendations, the Joint Board adopts an extremely narrow definition of universal service, *i.e.*, single party service, voice grade access to the public switched telephone network, dual tone multi-frequency signal (DTMF) or its functional digital equivalent, access to

emergency services and access to operator services. *See Recommended Decision* at ¶ 46. The Commenters, in their original filing, recommended support for other services that are subscribed to by a majority of Americans and are a public convenience and necessity, such as modern network facilities, internet access availability, call trace and 900-number blocking services.<sup>1</sup> Inclusion of these services is necessary to fulfill Congress' mandate and to ensure full participation in the information age.

In the universal service provisions of the Act, Congress directed the Joint Board and the Commission to “base policies for the preservation and advancement of universal service” on the principle, *inter alia*, that “[a]ccess to **advanced telecommunications and information services** should be provided in all regions of the nation.” 47 U.S.C. § 254(b)(2) (emphasis added). The Joint Board’s recommendations, however, ignore this plain statutory mandate. Instead, the recommendations would support a core group of services that amounts to little more than Plain Old Telephone Service (“POTS”). The Joint Board altogether excluded advanced services from support, and defined information services like the Internet to be outside the scope of the entire provision.

Universal access to advanced services has become vital to full participation in public discourse, education, health care and commerce. Rural and low-income residents, a disproportionate percentage of whom are minorities, stand to gain the most from access to advanced telecommunications services. These services offer the opportunity for these

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<sup>1</sup> *Joint Comments of People for the American Way, Alliance for Community Media, Alliance for Communications Democracy, Benton Foundation, Center for Media Education, League of United Latin American Cities, Minority Media and Telecommunications Council, National Council of La Raza, and National Rainbow Coalition*, CC Docket No. 96-45 at 11 (filed April 12, 1996) (“Original Comments”).

Americans to access resources never before available to them, and to make their voices heard as never before. Excluding such services from universal service support, however, threatens to disenfranchise this large segment of society from many of the benefits of the information age.

**B. The Commission Should Reject the Joint Board's Recommendations on Internet Access**

In its recommendations, the Joint Board found that voice grade access to the public switched telephone network would be enough to support local, non-toll access to the Internet, and that the actual use of Internet service could not be supported because it is not a “telecommunications service.” *Recommended Decision* at ¶ 69. The Commenters urge the Commission to reject the Joint Board's constricted approach to Internet access, and to include it in the universal service definition.

In determining that Internet access is not a “telecommunications service,” the Joint Board ignores Congress' clearly expressed definition, and evidences a fundamental misunderstanding of the structure of the Internet. The Senate Commerce Committee's report defined “telecommunications service” as including “the transmission, without change in the form or content,” of information services, *inter alia*, but not the services themselves. S. Rep. No. 23, 104th Cong., 1st Sess. 18 (1995). This is a conduit-versus-content distinction.

What the Joint Board fails to recognize is that Internet service providers (“ISPs”) merely provide conduit, not content. ISPs, such as UUNet, Netcom, and Erol's, only supply a pipeline through which users can access information. Through their networks, users can access information which is available from remote content suppliers, such as “Washington Post

Online,” Yahoo, or the White House Web Site.<sup>2</sup> The ISPs do not change the form or content of this information. This facet of the nature of Internet service has been recognized by the Federal courts, *C.f.*, *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), and ironically, by the Joint Board itself. Elsewhere in its recommendations, the Board directs that schools and libraries receive discounts for the “conduit” of basic Internet access, but not for additional content services. *Recommended Decision* at ¶ 463. Therefore, in failing to follow this distinction in its definition of supported telecommunications services, the Joint Board ignores not only Congress’ intent but its own findings.

Moreover, should the Commission adopt the Joint Board’s interpretation of “telecommunications service,” it would likely preclude universal service support for Internet service in the near future. An agency’s interpretation of a statute is extremely difficult to reverse in any case, see *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut.*, 463 U.S. 29, 42 (1983), but it is especially difficult when that interpretation is the agency’s initial construction of the statute. While the Commenters urge the Commission to include Internet service in the universal service definition at the outset,<sup>3</sup> it should, at the very least, define it as a “telecommunications service” not presently subject to universal service support.

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<sup>2</sup> A source of confusion may be that so-called “online services,” such as America Online, provide both: a selection of originally created content and a conduit through which users can pass into the greater selection of content sources available on the Internet.

<sup>3</sup> The Internet and other data networks are the cornerstone of the emerging telecommunications infrastructure, and supporting access to and the use thereof is increasingly central to First Amendment goals. Every American should therefore have access to the quality of service necessary to enable full, graphical connections to the Internet. If voice grade access to the public switched telephone network is not enough to support such a connection, the Commission must support a quality of service that will.

Finally, as the Commission considers in other proceedings the possibility of charging access fees to Internet service providers, it must keep in mind that this cost would likely be passed along to subscribers. If it does impose such fees, it should consider them in determining whether and in what amount to support Internet access.

## **II. THE COMMISSION SHOULD ESTABLISH A FRAMEWORK FOR THE PERIODIC REVIEW OF THE UNIVERSAL SERVICE RULES**

In implementing section 254(c)(1) of the Act, the Joint Board recommended that it review the universal service policies no later than January 1, 2001. *See Recommended Decision* at ¶ 110. This recommendation is not only contrary to the plain language of section 254(c)(1), it disregards the speed with which telecommunications services evolve.

The plain language of the statute demonstrates that Congress intended the Joint Board to undertake a regular review of universal service. Section 254(c)(1) mandates that the “Commission shall establish [the definition of universal service] *periodically*.” 47 U.S.C. 254(c)(1) (emphasis added). If this language means anything, it requires more than one review after four years.

As a matter of policy, a biennial review will better serve the public interest. Advances in telecommunications and information services occur at lightning speed, and a review every two years, rather than four or five, is necessary to keep the universal service policies current. As advances take place, Americans will incorporate them into their everyday lives and come to rely on them. The Internet is a prime example of this: four years ago, only a select few used this service, but it has exploded over the last two years into a network that millions now use every day for communicating with friends and family, accessing news and information, and myriad

other uses. No one can even predict all the uses for which the Internet and other services will be used two years from now, but everyone agrees that they will be even more central to everyday existence, making a more frequent, periodic review of universal service necessary.

### **III. THE JOINT BOARD CORRECTLY IDENTIFIED THE FACTORS THAT MUST BE CONSIDERED WHEN DEFINING AFFORDABILITY**

A broad basket of services supported by the universal service mechanisms would mean nothing if those services, both individually and as an entire package, were not affordable. The Commenters agree with the Joint Board that any definition of affordability must also take into account non-rate factors and income levels, and not be based solely on subscribership levels. *See Recommended Decision* at ¶¶ 126-30. While the Commenters also agree in general that the states should take the lead in defining affordability, because they better understand local conditions, the Commission must play a stronger role than recommended by the Joint Board, by requiring the states to base their definition on a fixed or progressively increasing percentage of disposable income.

The Joint Board correctly determined that various non-rate factors, especially the size and makeup of the local calling area, could significantly impact whether rates are actually affordable. *See id.* at ¶¶ 126,128. For example, a seemingly low rate that only provides access to a very limited local calling area is not adequate. The Joint Board not only considered the importance of the size of a local calling area to determining affordability, but also whether that calling area includes the customer's "community of interest," *i.e.* hospitals, schools, and other essential

services. *Id.* at ¶128. The Commenters agree with the Joint Board that these non-rate factors must be stressed as well.

The Joint Board also found that there was a “general correlation between subscribership level and affordability,” but that a high penetration rate “does not ensure that rate levels are affordable.” *Id.* at ¶ 127. The Commenters concur in this refusal to base the definition of affordability solely on subscribership levels. A high subscribership level does not reveal when the average family is spending a disproportionate amount of its disposable income on telecommunications services, at the expense of other basic needs such as food and housing.

However, the Joint Board did not go far enough in recognizing the importance of a customer’s disposable income level to the definition of “affordable.” Instead, the Joint Board merely concluded that income level is “a factor that should be examined when addressing affordability,” without further emphasis. *Id.* at ¶ 129. The Commission must take that recommendation one step further and establish a formula for the definition of affordability which is based on a fixed or progressively increasing percentage of disposable income. This is an equitable solution: citizens with the very lowest income levels, a disproportionate percentage of whom are minorities, are least able to afford telecommunications services. Similarly, some citizens in rural and high cost areas may not be able to bear much of their higher costs of service.<sup>4</sup>

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<sup>4</sup> While the Commenters agree with the Joint Board that the states should take the lead in defining affordability, establishing a nationwide percentage of income cap does not impair the ability of states to establish a locally-tailored definition of affordability in the same way that a nationwide affordable rate would. It is possible to do both.

Income level must also play a greater role in triggering Commission review of state rate setting. The Joint Board recommended that such a review be triggered by falling subscribership levels in a given state. *See id.* at ¶ 132. As discussed above, however, high subscribership levels may not accurately reflect affordability. For example, subscriber levels may not fall, even though real income levels have dropped.

**IV. THE JOINT BOARD'S RECOMMENDATIONS ON SCHOOL AND LIBRARIES ACCESS SHOULD BE EXTENDED TO OTHER COMMUNITY INSTITUTIONS, AND MUST ALSO INCLUDE PROTECTIONS AGAINST RACIAL DISCRIMINATION.**

**A. The Joint Board Should Extend Access to Advanced Telecommunications and Information Services to Community Institutions Other Than Schools and Libraries.**

While the Joint Board has taken a narrow view of the services to be supported for individuals, it has taken to heart the Congressional mandate to increase access to advanced services for schools and libraries. It has broadly interpreted section 254(h) to include a 20-90% discount for all telecommunications services, Internet access, and internal connections. *See id.* at ¶ 440. The Commenters strongly support these recommendations, and renew their call for the Commission to implement similar support for a wide variety of other community institutions and organizations, including community computing and media centers.

Promoting access for community institutions and organizations will allow more individuals to access advanced services, foster the efficient use of scarce resources, and provide a forum for skills training, information exchanges, technical support, and the incubation of new technologies. It could also help alleviate the negative effects of the Joint Board's narrow

universal service definition by providing affordable access to those citizens who are not attending elementary or secondary schools, or who may live in a community where library resources are limited.<sup>5</sup>

**B. The Joint Board's Recommendations Must Include Protections Against Discriminatory Deployment of Advanced Telecommunications and Information Services.**

The Joint Board's recommendations do much to ensure that every American child has access to advanced telecommunications and information services. However, they fall short in one critical area - they do not provide adequate protections against discriminatory deployment of those services based on race. These problems are especially acute in school districts which are currently, or have been, the subject of federal district court supervision to eliminate the vestiges of school segregation. The lack of such protections runs contrary to the plain language of the recently amended Title I, Section I of the Communications Act, which requires that the FCC make telecommunications services available to "all people of the United States, without discrimination on the basis of race, color, religion, national origin or sex...." 47 U.S.C. 151.

There are several, minimally burdensome protections the Commission should adopt to prevent such deployment. First, it should require that, when a school district requests funding for wiring classrooms, that the fund administrator certify that the schedule and terms of deployment will occur in a manner that does not discriminate based on race. If the school district is under federal district court supervision to eliminate school desegregation, the certification should be accompanied by an order from the supervising judge that the deployment schedule (including the

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<sup>5</sup> In any event, the Commission must not use broad institutional access to advanced services as an excuse for not supporting such services for low income and rural Americans.

schedule for deployment of ancillary hardware, software and wiring, and for teacher training and scheduling), will not violate Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, and will advance Title VI's goal of affirmatively eliminating the consequences of school segregation.

If the school district was, but is no longer under federal court supervision, the certification should contain sufficient information to permit the Department of Justice's Civil Rights Division to determine that no violation of Title VI would arise which might require a return to federal court supervision. In both cases, school districts should coordinate these certifications with community organizations which serve (or served) as the plaintiffs in school desegregation suits, such as the local branch of the NAACP.

The need for protections against discriminatory deployment of advanced telecommunications and information services is quite real. The Department of Education recently found that schools in predominantly white neighborhoods receive Internet accessible computers before predominantly non-white neighborhoods. *See* National Center for Education Statistics, U.S. Department of Education, "Advanced Telecommunications in U.S. Public Elementary and Secondary Schools, 1995," Report NCES-96-854 (February, 1996). This need is magnified in light of the fact that white children have already enjoyed a head start in exposure to advanced telephone technology.<sup>6</sup>

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<sup>6</sup> For example, custom calling services such as call waiting, call forwarding and three-way calling), which provided the public with their first exposure to the full potential of telephony as a business tool, were typically deployed first in suburban and other mostly-white local exchanges.

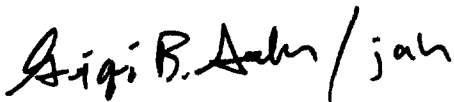
## CONCLUSION

The universal service principles are central to promotion of First Amendment values and to ensuring that every citizen can fully and equally participate in society. To best serve these principles and fulfill Congress' intent, the Commission must adopt a broader definition of universal service than recommended by the Joint Board, but act in general accordance with those recommendations on the issues of affordability and institutional access to advanced telecommunications and information services.

Respectfully Submitted,



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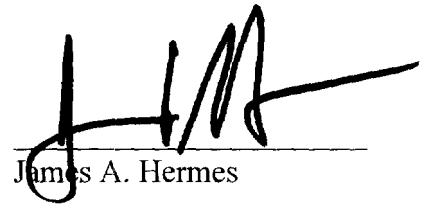
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### **CERTIFICATE OF SERVICE**

I, James A. Hermes, certify that on this 19th day of December, 1996, I caused copies of the foregoing "Comments" to be served by mail, first class postage prepaid, on the parties listed in the "Service List" contained in the Public Notice, DA 96-1891. I further certify that I submitted a diskette containing the "Comments" as required by the Public Notice.



James A. Hermes